Benefits and Employment Briefing

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NEW YORK AG INVESTIGATES DATA USED TO DETERMINE OUT-OF-NETWORK REIMBURSEMENT RATES

Many group health plans provide that reimbursement of "out-of-network" claims will be based on a percentage of the "reasonable and customary" (R&C) charges. In most cases, the determination of an R&C charge is based on data obtained from third-party sources. A new investigation by the office of the New York Attorney General (NYAG) should prompt plan administrators to take a second look at the source of such data.

The NYAG began an industry-wide investigation after receiving numerous complaints concerning the data provided by Ingenix, a leading provider of R&C data. Ingenix is a wholly owned subsidiary of UnitedHealth Group (UHG). The complaints alleged that inaccuracies in the Ingenix data resulted in significantly lower reimbursements to providers. The NYAG claimed that the major health insurers have a conflict of interest in using the Ingenix database because the insurers, who provide some of the underlying billing information on which Ingenix bases its R&C rates, have an incentive to manipulate the data they submit to Ingenix.

Both UHG and Aetna, another major insurer that uses Ingenix data, have entered into agreements with the NYAG to fund an independent, not-for-profit entity to develop and maintain a database on which R&C reimbursement levels will be based. UHG has agreed to contribute $50 million to the establishment of the new entity, and Aetna has agreed to contribute $20 million. The agreements also call for the new entity to establish a website so that consumers can easily determine in advance the out-of-network reimbursement rates in their own geographic areas.

At the same time, UHG has also agreed to pay $350 million to settle a class action lawsuit brought on behalf of providers and plan participants alleging similar Ingenix inaccuracies and under-reimbursements for out-of-network claims. Plan sponsors should consult with legal counsel to determine if the plan and its participants are a part of the class that will share in these settlement funds.

Under the terms of the agreements with the NYAG, UHG and Aetna may continue using Ingenix data until the new entity is operational, but they must clearly communicate that Ingenix is owned by UHG and clarify how out-of-network reimbursements are calculated. Plan sponsors should determine whether their insurers and/or third-party administrators use Ingenix data to determine out-of-network reimbursement rates and, if so, whether to continue that relationship.

In the long run, the fallout from the NYAG investigation is likely to increase plan costs, particularly if the overall out-of-network reimbursement rates rise as a result of the new entity's independent determination of R&C charges.

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SUPREME COURT (AGAIN) SAYS PLAN ADMINISTRATOR MAY RELY ON BENEFICIARY DESIGNATION

The U.S. Supreme Court has ruled that plan administrators may rely on the documents governing the plan, and have no duty to look beyond those documents, to determine the beneficiary of a deceased plan participant. In Kennedy v. DuPont Savings and Investment Plan, issued on January 26, 2009, the Court held that the plan administrator of a retirement plan properly paid benefits to a deceased participant's ex-spouse (who was still the participant's designated beneficiary at the time of the participant's death), even though the ex-spouse had apparently waived her right to benefits under the plan in the parties' divorce decree.

THE PROBLEM

This is the second time since 2000 that the Supreme Court has addressed the question of how plan administrators should deal with an increasingly common problem: the participant who names his or her spouse as plan beneficiary, but later divorces without filing an updated beneficiary form. If such a participant dies before all plan benefits have been distributed, and if the last beneficiary form completed by the participant still names the former spouse, the plan administrator may face conflicting claims by both (i) the participant's ex-spouse, who is the named beneficiary, and (ii) the participant's estate or surviving family members.

In its 2001 holding in Egelhoff v. Egelhoff, the Supreme Court held that plan administrators of ERISA-covered plans need not look to state law in determining a beneficiary's status. In that case, the court determined that ERISA preempted a Washington state statute providing that any designation of a person's spouse as the beneficiary of a nonprobate asset is revoked in the event of divorce. Prior to that decision, the federal courts of appeals had split on whether ERISA preempts state laws governing the effect of divorce on beneficiary designations. In Egelhoff, the court found that the statute ran counter to the requirement in Section 402(b)(4) of ERISA that a plan "specify the basis on which payments are made to and from the

plan," as well as the requirement in Section 404(a)(1)(D) of ERISA that plan fiduciaries administer the plan "in accordance with the documents and instruments governing the plan." Therefore, the court held that the Washington state statue was preempted by ERISA.

"FEDERAL COMMON LAW" OR "PLAN DOCUMENTS" RULE?

Last year, the Supreme Court agreed to hear the Kennedy case to resolve yet another split among the federal courts of appeals (and certain state supreme courts) as to whether the designation of an ex-spouse as beneficiary could be effectively waived in a marital settlement agreement or divorce decree that is not a qualified domestic relations order (a "QDRO"). One view was that plans should follow "federal common law" and allow for such a waiver. The opposing view directed plan administrators to follow the plan documents and beneficiary designations on file.

In its unanimous holding in Kennedy, the Supreme Court held in favor of the latter view, sometimes referred to as the "plan documents" rule. Specifically, the Court found that, although the waiver of benefits in the divorce decree did not a violate the anti-alienation provisions of ERISA, the plan administrator did its ERISA duty by paying the retirement benefits to the ex-spouse in conformity with the plan documents. In other words, the plan administrator properly disregarded the waiver provision in the divorce decree because it conflicted with the latest beneficiary designation on file.

Interestingly, the plan in this case would have accepted a "qualified disclaimer" under the Tax Code, but no such disclaimer was filed by the ex-spouse. Although the ex-spouse "waived" her right to the participant's benefit at the time of the divorce, she apparently chose not to "disclaim" the $400,000 benefit that became payable to her upon the participant's death.

IMPLICATIONS FOR PLAN ADMINISTRATORS

This ruling is generally seen as good news for employers and plan administrators. In combination with the Egelhoff decision, it means that plan administrators do not have to look beyond the documents governing the plan (including beneficiary designation forms completed by plan participants) to determine the rightful beneficiary of a deceased plan participant's interest under the plan. The Egelhoff case established that plan administrators need not be concerned with state laws that purport to revoke the designation of a former spouse upon divorce, and the Kennedy case now establishes that administrators do not need to look outside the plan documents to determine whether a former spouse has "waived" his or her interest under the Plan.

The court did indicate, however, that a plan

administrator that follows the terms of a QDRO is essentially enforcing a plan document. Thus, a plan administrator may not ignore a valid QDRO or disclaimer that is filed in accordance with the terms of the plan. However, the plan administrator need not look at other documents (such as a divorce decree that does not qualify as a QDRO) to resolve what the court characterized as "factually complex and subjective" waiver issues, such as whether a waiver is voluntary or addresses the particular benefits at stake.

IMPLICATIONS FOR PARTICIPANTS AND BENEFICIARIES

Although this ruling provides more certainty for plan administrators, it also means that plan participants must be diligent in updating their beneficiary designations. Participants going through a divorce cannot rely on language in the divorce decree to change the effect of a prior beneficiary designation; they must complete a new beneficiary designation form.

Moreover, as the Court pointed out, because QDROs by definition assign benefits to alternate payees, a beneficiary seeking only to relinquish his or her right to benefits cannot do so through a QDRO. Thus, plan administrators may wish to have other procedures in place (such as a procedure for accepting Tax Code disclaimers) that will allow a beneficiary to renounce a benefit under the plan. Plan sponsors might also consider adopting plan provisions that automatically revoke spousal beneficiary designations upon divorce.

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REDUCTIONS IN FORCE: KEY LEGAL ISSUES

As the economy continues to implode, many employers are finding it necessary to institute involuntary reductions in force (or "RIFs"). In doing so, they should take note of various legal issues a RIF may implicate. This article will highlight a few of those issues.

WARN ACT

Depending on the size of the employer and the nature of the RIF, the federal Worker Adjustment and Retraining Notification ("WARN") Act may apply. The WARN Act requires 60 days' advance notice to employees being terminated, any affected unions, and the state and local governments where those employees work. Failure to provide this notice could subject an employer to liability for compensation and benefits attributable to the 60-day notice period, as well as attorneys' fees and a civil penalty of up to $500 per day.

Employers subject to the WARN Act include those with 100 or more full-time employees, as well as those with 100 or more total employees (including part-time employees) who together work 4,000 or more non-overtime hours per week. The notice obligation is triggered by either a "facility closing" or a "mass layoff." A facility closing includes the permanent or temporary shutdown of a worksite, with 50 or more full-time employees losing their employment during any 90-day period. A mass layoff is any RIF not resulting from a facility closing in which 500 or more full-time employees are terminated or at least 50 full-time employees are terminated during any 90-day period, with those 50 or more employees constituting at least 33% of the employer's workforce.

For purposes of this Act, a termination of employment includes any layoff exceeding six months, any reduction in hours of more than 50% during any six-month period, as well as any involuntary termination of employment (other than a discharge for cause). Various categories of terminated employees may be disregarded, including those who are offered a transfer to a nearby worksite and those who accept a job with the buyer of all or a portion of the employer's assets.

COBRA OBLIGATIONS

Of course, a RIF constitutes a COBRA qualifying event. Accordingly, any RIF'd employee who is covered under the employer's medical, dental, or vision plan must be offered COBRA coverage. An appropriate COBRA notice should be provided to the employee (and any covered dependents) within the statutory time frame. This is generally 44 days after the termination date, assuming the employer also serves as the plan administrator.

If the employer intends to provide RIF'd employees with a period of continued health coverage at the active-employee rate, the COBRA notice should make clear that this subsidized coverage period counts against the 18-month COBRA period. If the employer's intent is to add this subsidy period to those 18 months, any self-funded health plan should be amended to reflect that fact, and the insurer of any insured plan should be consulted before this approach is communicated to the employees.

PARTIAL TERMINATION OF RETIREMENT PLAN

Under certain circumstances, a RIF may trigger a "partial termination" of a qualified retirement plan. Should this occur, the participants affected by that partial termination must be made fully vested in their accrued benefits or account balances. Thus, before implementing any substantial RIF, an employer will want to determine whether a partial termination might result.

Although there is no bright-line test for identifying a partial termination, both the IRS and the courts have adopted a 20% "rule of thumb." That is, if the number of participants affected by the RIF are at least 20% of the total plan participants (counting both participants employed at the start of the plan year and any employees who became participants during that year), a presumption will arise that those RIF'd employees are entitled to full vesting.

The IRS's latest statement of this rule of thumb appears in Revenue Ruling 2007-43, which also clarifies that employee terminations required as a result of an economic downturn must be counted against this 20% threshold. Only those resignations for which an employer can provide proof of "voluntariness" may be disregarded.

DEFERRALS FROM POST-SEVERANCE COMPENSATION

Any employer that sponsors an employee-deferral retirement plan (such as a 401(k), 403(b), or 457(b) plan) will also want to pay careful attention to recent IRS guidance on the types of post-severance compensation from which salary deferrals may be taken. These regulations, issued under Section 415 of the Tax Code, generally require that any such plan allow salary deferrals to be taken from any "regular pay" that is paid within 2½ months after an employee's termination of employment. For this purpose, "regular pay" includes overtime pay, shift differential pay, commissions, and bonuses.

By contrast, no deferrals may be taken from severance pay – even if paid within this 2½ month window. This same prohibition applies to "parachute payments" (generally, payments conditioned on a change of control) and distributions from nonqualified deferred compensation plans (unless the payment would have been made at the same time even if the employee had not terminated).

Finally, there is a middle category of post-severance compensation that the IRS allows, but does not require, a plan to include when calculating a terminated employee's salary deferrals. This category includes the cashout of any accrued sick, vacation, or other leave, nonqualified deferred compensation that would have been paid at the same time even if the employee had not been terminated, and certain payments to disabled employees and individuals serving in the military.

The plan document must state whether deferrals will be allowed from this third category of post-severance compensation. That document should therefore be consulted before any RIF-related payments are made. If the plan document has not yet been amended to address this issue, such an amendment should be given high priority; the deadline for adopting such a Section 415 amendment is fast approaching.

COMPLIANCE WITH CODE SECTION 409A

Post-termination payments to RIF'd employees also raise issues under another Tax Code provision. Section 409A places constraints on the timing of distributions from nonqualified deferred compensation plans. Due to an extremely broad definition of deferred compensation, these constraints could even apply to severance pay. Accordingly, an employer should at least consider these Section 409A constraints before finalizing any plans to make severance payments to RIF'd employees. In most cases, severance payments can be made to fall within an exemption from these Section 409A rules.

Another Section 409A issue arises from any attempt to modify a preexisting promise to pay deferred compensation to a RIF'd employee. Such a modification, particularly if it either defers or accelerates the payment of that deferred compensation, could constitute an impermissible "substitution" under Section 409A.

Any violation of Section 409A would subject the recipient of the deferred compensation to immediate taxation (even if the payments will be made over a period of years), a 20% penalty tax, and substantial interest assessments. Although employers bear only reporting obligations, any actions that expose RIF'd employees to substantial tax penalties will only heighten the risk of those employees filing a legal challenge to the termination.

EMPLOYMENT DISCRIMINATION OR RETALIATION CLAIMS

Such a challenge might be filed under any of several federal or state statutes barring impermissible discrimination in the terms and conditions of employment. All employees fall within one or more of the "protected classes" under these statutes, so any RIF could trigger an employment discrimination lawsuit. The risk of such a claim is heightened, however, if RIF'd employees are age 40 or over, and therefore protected by the federal Age Discrimination in Employment Act ("ADEA"). For this reason, many employers will seek to obtain a release of liability from the terminating employees.

Such a release is a written agreement on the part of the employee to release whatever claims he or she might have against the employer. A release is valid only if it is voluntary and if the employee is given something of value (other than something to which the employee is already entitled under an employer policy or applicable law) in return for it. Releases should be carefully drafted in order to be effective and enforceable. Moreover, any release of claims under the ADEA must contain special language and must allow the employee at least 21 days (or 45 days, if

multiple employees are affected) in which to consider whether to sign the release.

In addition to employment discrimination claims, a RIF may trigger "retaliation" claims. This is a claim in which an employee asserts that he or she was terminated in retaliation for exercising a protected legal right, such as filing a workers' compensation claim, reporting sexual harassment in the workplace, or "whistle blowing" on the employer. If properly drafted, a release of liability may also protect an employer against retaliation claims.

ERISA SECTION 510 CLAIMS

In addition to these types of retaliation claims, a RIF'd employee could also file suit against the employer for violating Section 510 of ERISA. This provision makes it illegal for an employer to terminate or otherwise discipline a participant in an ERISA plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." Although most Section 510 claims involve employees who were terminated shortly before vesting in an employer-sponsored retirement plan, we are seeing such claims made in a variety of other circumstances.

For instance, a Massachusetts federal court recently allowed a Section 510 claim by an employee who was terminated for violating an employer's anti-smoking policy. The employee contended that the employer's true motivation for the termination was to minimize claims under the employer's self-funded medical plan. The possibility of Section 510 claims should thus be considered when an employer is crafting any reduction in force.

CONCLUSION

This list of RIF-related legal issues is far from exhaustive. Moreover, there are a host of practical issues to consider when implementing a RIF. These range from the risk of workplace violence to public relations concerns. Employers contemplating a RIF would therefore be well-advised to consult with legal counsel at a relatively early stage in the process.

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RECENT CMS GUIDANCE ON MANDATORY MSP REPORTING

As we reported recently, the Mandatory Medicare Secondary Payer Reporting Program went into effect as of January 1, 2009. On December 17, 2008, the Centers for Medicare and Medicaid Services ("CMS") issued an updated "2.0 version" of

the Group Health Plan User Guide for use by responsible reporting entities ("RREs"). An RRE is defined as "an entity serving as an insurer or third party administrator for a group health plan … and, in the case of a group health plan that is self-insured and self-administered, a plan administrator or fiduciary."

"ACTIVE COVERED INDIVIDUALS"

The updated User Guide clarifies and updates a number of aspects of the new program. For example, it makes clear that individuals covered by COBRA are excluded from the definition of "active covered individuals" – those individuals for whom the RRE is responsible to report. It also increases the age threshold used in the definition of "active covered individuals" from 45 to 55 years old. However, this age threshold will be lowered back to 45 on January 1, 2011.

"FINDER FILE" OPTION

CMS also unveiled an alternative to using the age threshold for purposes of the mandatory reporting requirement. The "finder file" option involves the RRE sending a "query file," through which CMS would identify any Medicare beneficiaries who are currently known to CMS and return those positive identifications to the RRE. The RRE would then submit the required records for those identified Medicare beneficiaries.

However, the CMS User Guide notifies RREs that the use of the "finder file" is not a foolproof method of identifying all individuals for whom an RRE is required to report. Moreover, CMS reminds "finder file" option users that this probability of under reporting must be "carefully weighed by any RRE considering the finder file reporting option."

FSAS, HSAS, AND HRAS

CMS has also updated the explanation of the reporting requirements applicable to flexible savings accounts ("FSAs"), health savings accounts ("HSAs"), and health reimbursement accounts ("HRAs"). Generally, FSAs and HSAs are not reportable, but HRAs are considered to be reportable group health plans.

DENTAL OR VISION COVERAGE

When offered as a stand-alone product, dental or vision coverage is not reportable. However, RREs are "responsible for being aware of situations where dental or vision care services are covered by Medicare and pay primary to Medicare for all beneficiaries who have such stand-alone coverage when appropriate."

DEPENDENTS' SOCIAL SECURITY NUMBERS

Perhaps most significantly, an extension has been granted for RREs to collect Social Security numbers for dependents whose initial effective date with the Plan was prior

to January 1, 2009. RREs now have until January 1, 2011 (instead of 2010) to report on these individuals.

There are important caveats to this extension, however. First, the extension applies only to dependents of participants who were enrolled in the plan prior to January 1, 2009. Moreover, this extension is not a waiver; these Social Security numbers will still need to be reported by January 1, 2011. Nonetheless, for those RREs that did not have a process in place for collecting dependents' Social Security numbers before January 1, 2009, this relief will provide an opportunity to educate their prior enrollees as to the new requirement and collect the necessary data.

CONCLUSION

The updates discussed in this article are not comprehensive. Any RRE should download the new User Guide and review any other updates that may be relevant.

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REQUIRED MINIMUM DISTRIBUTION RELIEF: A NIGHTMARE FOR EMPLOYERS

In an effort to cushion the blow to retirement savings inflicted by the stock market crash, former President Bush signed the Worker, Retiree and Employer Recovery Act of 2008 ("WRERA" or the "Act") on December 23, 2008. Although the Act provides some much needed funding relief for sponsors of defined benefit plans, its attempt to help retirees under defined contribution plans will leave the sponsors of those plans reaching for a bottle of aspirin.

Among other things, WRERA amends Section 401(a)(9) of the Tax Code to temporarily suspend the rule that requires retirees who are at least 70½ years old to receive a minimum distribution each year. Such "required minimum distributions" (or "RMDs") must generally begin by April 1 of the calendar year following the year in which the retiree reaches age 70½, and then continue to be made as of the end of each calendar year thereafter.

The problem posed by the precipitous decline in plan account balances during 2008 would have been compounded for retirees who were due to receive RMDs in 2009. Because RMDs are based on account balances as of the end of the prior year, such retirees would have been forced to lock in a portion of their 2008 losses by taking a distribution in 2009. Congress heard from many retirees who preferred to delay such distributions, allowing time for the market to recover.

Congress's answer to this problem was simple enough to articulate: For 2009,

RMDs need not be made. As is the case for most legislative solutions, however, the devil is in the details. For example, WRERA does not indicate whether the suspension of RMDs constitutes mandatory, or merely optional, relief. Nor does the Act state whether individual retirees may choose whether to continue receiving RMDs in 2009 and, if so, when and how they must be notified of their options. Moreover, assuming that the Act permits either employers or retirees to continue RMDs during 2009, it leaves the tax treatment of those distributions in doubt.

Although the IRS is likely to issue guidance on certain of these questions, it is unclear when that guidance might be forthcoming. In the meantime, employers should consider how WRERA may affect their specific plans and retirees.

LIMITED RMD RELIEF

The RMD relief enacted by WRERA disappointed many, as it does not apply to defined benefit plans. Instead, it covers only qualified defined contribution plans (e.g., 401(k), profit sharing, and money purchase pension plans), as well as 403(b) plans, 403(a) plans, governmental 457 plans, and IRAs. Moreover, it relates only to 2009 distributions.

Individuals who turned 70½ before 2008 and were already receiving RMDs will have their 2009 distribution delayed until 2010. Such a delay will also apply to retirees who reach age 70½ during 2009. Their first RMD will be delayed from April 1, 2010, to the end of 2010.

RMDs that are being made to a deceased participant's beneficiary will also be delayed for one year. Such distributions generally must be made within the five-year period following the participant's death. Under WRERA, plans may simply ignore 2009 when calculating this five-year payout.

WRERA does not apply, however, to RMDs that are due by April1, 2009, to retirees who turned 70½ during 2008. This is because such a distribution would relate to 2008, rather than 2009. The next distribution that such an individual would be required to take, which would normally be due by December 31, 2009, is covered by the relief. That distribution may thus be delayed until the end of 2010.

The following table illustrates the application of WRERA's RMD relief to various categories of retirees:

YEAR ATTAINED AGE 70½	NEXT DISTRIBUTION PRE-WRERA	NEXT DISTRIBUTION UNDER WRERA
Prior to 2008	December 31, 2009	December 31, 2010
2008	April 1, 2009; then… December 31, 2009	April 1, 2009; then… December 31, 2010
2009	April 1, 2010	December 31, 2010

Beginning in 2010, RMDs will be calculated just as they were prior to WRERA. Thus, plans will generally determine a retiree's 2010 RMD by dividing the December 31, 2009, account balance by the appropriate Uniform Life Table factor in the IRS regulations.

IS SUSPENSION OPTIONAL OR MANDATORY?

One of the most basic questions about WRERA is whether the RMD relief is mandatory, or whether sponsors and/or retirees may elect whether to take advantage of it. The hastily drafted Act is ambiguous on this point. Most analysts believe that the relief is optional, but at least two industry groups have asked the IRS for reassurance on this point.

Assuming that suspension of the 2009 RMDs is not mandatory, employers have a number of options to consider. For instance, they could choose to suspend all 2009 RMDs, regardless of the terms of their plan and prior distribution elections made by participants. They could also choose to ignore WRERA and continue making RMDs for 2009. (As explained below, such distributions may have to be treated as eligible for rollover, unlike most RMDs.) Or, they could solicit individual elections from affected retirees (more on that option below). Whichever option they choose, however, employers should carefully evaluate its consistency with the terms of their plan.

NOTICE REQUIREMENTS AND ROLLOVER OPTIONS

It is also unclear whether individual retirees may have a say in this matter. Some retirees may want – or indeed need – to receive a distribution for 2009. Blindly suspending such payments pursuant to WRERA may be to their disadvantage. Absent further guidance, it is even possible that discontinuing RMDs without a retiree's consent could amount to an impermissible cut-back of benefits, violating Section 411(d)(6) of the Code. Yet the RMD waiver provisions of WRERA do not even include any retiree notice requirements.

Despite the absence of formal guidance, employers would be well advised to consider providing some kind of disclosure to their retirees. Depending on the manner in which plans implement the new rules, RMD recipients may have options with very different tax consequences.

For instance, RMDs are normally excluded from the Tax Code's definition of an "eligible rollover distribution." Thus, recipients are taxed immediately on those payments; they cannot roll them into another plan or IRA. Moreover, RMDs are subject to the voluntary 10% withholding, rather than the mandatory 20% withholding applicable to eligible rollover distribution amounts that are not directly rolled over.

Under WRERA, however, 2009 distributions that would have been RMDs are not treated as RMDs. They may thus be eligible rollover distributions. This means that retirees may roll such distributions into an IRA or other employer plan, thereby avoiding immediate taxation on the distributions.

For administrative simplicity, the Act does not require plans to treat 2009 RMDs as being eligible for direct rollover from the distributing plan to another plan or IRA, although they are permitted to do so. This means that plans need not offer retirees the direct rollover option, need not provide Code Section 402(f) rollover notices, and need not withhold at the 20% rate if a retiree elects a cash distribution. If a retiree wishes to complete an indirect rollover of the distribution, he or she will have the normal 60-day period in which to do so. In any event, it seems that retirees should be notified of their ability to make such a rollover.

TIMING OF PLAN AMENDMENTS

Another open issue is whether employers must amend their plan documents to reflect the treatment of 2009 RMDs. The answer will depend on how individual employers choose to treat such distributions, as well as the specific RMD language already in their plan documents. Although some plans do not have separate RMD forms of distribution, and may thus be largely unaffected by the Act, many others – including a popular prototype document – do make such forms available. Only an analysis of the plan's specific terms will determine whether employers must change their practices and/or plan documents in response to this RMD relief.

Some plans articulate the RMD rules by incorporating the provisions of Code Section 401(a)(9) by reference. For those plans, the suspension of RMDs for 2009 might be required, because WRERA amends Section 401(a)(9) by providing that those rules "shall not apply" in 2009. Thus, in order to make 2009 RMDs despite WRERA, such plans would have to be amended.

Other plans recite the RMD rules without specifically incorporating Section 401(a)(9). In those instances, it may be possible to continue applying the rules set forth in the plan – i.e., to continue making RMDs for 2009 – notwithstanding WRERA and without the need for a plan amendment. Indeed, unless the IRS issues subsequent guidance to the contrary, such plans would have to be amended (though not immediately) in order to suspend payment of 2009 RMDs. Otherwise, such a suspension would violate the plan's terms.

The Act gives employers until the beginning of the first plan year that begins on or after January 1, 2011, to make any required amendments. (For governmental plans, the deadline is the first plan year beginning on or after January 1, 2012.) Because of the

complexity of administering this aspect of the Act, however, it may be to an employer's advantage to adopt a good faith amendment – or at least administrative procedures documenting the employer's decisions – well in advance of this deadline. This sort of documentation may also make it easier to explain the new rules to participants and retirees.

IMMEDIATE CONSIDERATIONS FOR PLAN SPONSORS

Although further IRS guidance may answer some of the questions raised by the passage of WRERA, employers should begin now to address the implementation of these RMD changes. Among the issues to consider are the following:

- Does the employer's plan offer an RMD form of distribution?
- How many retirees are currently receiving RMDs?
- Will the employer suspend all 2009 RMDs, continue to make such distributions, or allow retirees to elect between these options?
- If the plan will not suspend all 2009 RMD payments, will it offer a direct rollover of such distributions – providing the required 402(f) notices and election forms?
- Must the plan document or election forms be modified to reflect the employer's choices for 2009 RMDs?
- Can the plan's service provider accommodate the employer's choices?

Close communication with the plan's legal counsel and service providers will likely be required to sort through this maze of issues.

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